UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| ASSOCIATED PRESS,<br><br>Plaintiff,<br><br>- v.-<br><br>UNITED STATES DEPARTMENT OF DEFENSE,<br><br>Defendant. | : | **ECF CASE**<br><br>05 Civ. 5468 (JSR) |

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**(CORRECTED) MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO WITHHOLDINGS IN SAMPLE PRE-ARB TRANSFER/RELEASE DOCUMENTS**

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# (CORRECTED) MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S PARTIAL MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO WITHHOLDINGS IN SAMPLE PRE-ARB TRANSFER/RELEASE DOCUMENTS

## Preliminary Statement

This motion addresses the issue of disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, of documents relating to decisions to transfer or release detainees held by the United States Department of Defense ("DOD") at the United States Naval Base, Guantanamo Bay, Cuba ("Guantanamo"), that were generated prior to the creation of the Administrative Review Board ("ARB") process in June 2004.[1] In accordance with the parties' agreement, which the Court endorsed orally on June 9, 2006, DOD processed a sample of the documents created through the pre-ARB review process for a detainee who has since been transferred from Guantanamo, and produced that sample to the Associated Press ("AP") on July 7. Further, DOD has processed and produces herewith a related sample worksheet for the detainee who was transferred, and an additional sample document for a detainee who was released after he was determined under a pre-ARB review process to no longer meet the definition of "enemy combatant." Collectively, these sample documents are hereafter referred to as the "sample transfer/release documents."

As set forth below, and in DOD's supporting declarations, the information withheld from the sample transfer/release documents is exempt from disclosure under FOIA, and the Court accordingly should grant summary judgment to DOD with regard to the withholdings in the sample documents.

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[1] This issue was not addressed in DOD's initial motion for summary judgment in this case ("AP II"), which is sub judice. DOD adopts and incorporates herein all of its prior submissions in AP II.

## STATEMENT OF FACTS[2]

### A. The Pre-ARB Detainee Review Process

Prior to the creation of the ARB process in June 2004, DOD assessed Guantanamo detainees for potential release or transfer through an inter-agency process managed by the Office of Detainee Affairs ("DA"). Declaration of Charles D. Stimson, Deputy Assistant Secretary of Defense for Detainee Affairs ("Stimson Decl.") ¶ 4. As part of this pre-ARB process, Joint Task Force Guantanamo ("JTF-GTMO") provided DA with an intelligence assessment of the detainee and a recommendation regarding his disposition through the United States Southern Command ("USSOUTHCOM"). Stimson Decl. ¶ 5; Declaration of Rear Admiral Harry B. Harris, Jr., Commander of JTF-GTMO ("Harris Decl.") ¶¶ 5-6 & Exh. 1 (sample USSOUTHCOM memorandum). DOD's Criminal Investigation Task Force ("CITF") -- which conducts worldwide criminal investigations to substantiate or refute alleged or suspected war crimes or acts of terrorism against U.S. persons, property, or interests -- also provided DA with a law enforcement assessment of the detainee and a recommendation regarding his disposition. Stimson Decl. ¶ 5; Declaration of Colonel David A. Smith, CITF Commander ("Smith Decl.") ¶¶ 3, 6-7 & Exh. 1 (sample CITF memorandum). In addition, DA consulted with other components of DOD, as well as other agencies of the U.S. government, including the Central Intelligence Agency and the Departments of State, Justice, and Homeland Security. Stimson Decl. ¶ 5.

Using this information, DA prepared an action memorandum for review by the Deputy Secretary of Defense, who under the pre-ARB review process was charged with deciding whether to transfer, release, or continue to detain a detainee. Stimson Decl. ¶ 6 & Exh. 1 (sample action memorandum). The action memorandum made a formal recommendation for the Deputy Secretary of Defense's consideration, contained a summary of the various organizations' opinions and recommendations regarding the detainee's disposition, and indicated where those recommendations varied from the recommendation of DA. Id. ¶ 6. Some of the action memoranda also contained a summary of the detainee's background and the intelligence value or law enforcement status of the detainee. Id. In most cases, the action memorandum discussed more than one detainee. Id. The USSOUTHCOM and CITF assessment memoranda for each detainee were attached to the action memorandum when it was forwarded to the Deputy Secretary of Defense for his decision. Id. ¶ 7. In many cases, DA also attached a one-page worksheet that summarized some of the pertinent information regarding the detainee's background and the recommendations of the various organizations. Id. & Exh. 2 (sample DA worksheet).

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[2] DOD is not submitting a Statement pursuant to Local Civil Rule 56.1, in accordance with the general practice in this Circuit. See Ferguson v. FBI, No. 89 Civ. 5071, 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), aff'd, 83 F.3d 41 (2d Cir. 1996). If the Court wishes DOD to submit such a Statement, we will do so promptly.

In addition, in March 2004, it was determined that 29 detainees being held at Guantanamo no longer met the definition of "enemy combatant," based on a review of the information currently available to DOD at that time. Harris Decl. ¶ 29. For each such detainee, USSOUTHCOM created a memorandum containing information about the detainee's background and analytical conclusions reached by JTF-GTMO regarding that background. See id. & Exh. 4.[3]

**B. The Information Withheld from the Sample Transfer/Release Documents**

DOD has withheld information from the sample transfer/release documents pursuant to

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[3] 38 additional detainees were determined by a Combatant Status Review Tribunal ("CSRT") to no longer meet the definition of "enemy combatant." Declaration of Karen L. Hecker dated August 22, 2006 ("Second Supp. Hecker Decl.") ¶ 16. For these detainees, DOD is processing an "Unclassified Summary of Basis for Tribunal Decision," which will be produced with only the names of U.S. military personnel redacted. Id. ¶ 16a.

Exemptions 1, 2, 5, and 6 of FOIA.

DOD has withheld several categories of information pursuant to Exemption 1, 5 U.S.C. § 552(b)(1), including: (1) background information concerning particular detainees, including detailed descriptions of their involvement in the Global War on Terrorism (either through their own reporting or through the reporting of other intelligence sources, including other detainees) and specific conclusions drawn by analysts about their activities, see Harris Decl. ¶¶ 14-22, 30, (2) conclusions reached by U.S. Government personnel regarding the intelligence and law enforcement value and threat assessment of particular detainees, see Harris Decl. ¶¶ 23-25; Smith Decl. ¶¶ 10-11, (3) the results of CITF's intelligence community database searches, see Smith Decl. ¶ 15, and (4) a handwritten notation on the DA action memorandum by the Deputy Secretary of Defense regarding future discussions with the country of origin of the detainees, see Stimson Decl. ¶¶ 8c, 11a.[4]

DOD also withheld information from the sample transfer/release documents pursuant to Exemption 2, 5 U.S.C. § 552(b)(2). This information concerns (1) internal guidelines followed by JTF-GTMO, USSOUTHCOM and CITF analysts in evaluating the relative intelligence and law enforcement value and threat level of detainees, see Harris Decl. ¶¶ 23, 26; Smith Decl. ¶¶ 10, 12, (2) information regarding the status of CITF's law enforcement investigation and internal investigatory guidelines and procedures followed by CITF, see Smith Decl. ¶¶ 13-15, and (3) full internment serial numbers ("ISNs") of detainees, see Harris Decl. ¶ 31.

Additionally, DOD withheld information from the sample transfer/release documents pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), and the deliberative process, attorney-client, and work product privileges. Pre-decisional intra-agency and inter-agency recommendations to the

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[4] This notation contained on the sample document is not typical. Stimson Decl. ¶ 11.

Deputy Secretary of Defense regarding whether particular detainees should be transferred, released, or continued in detention were withheld under the deliberative process privilege. See Stimson Decl. ¶¶ 8a, 9a, 10a; Harris Decl. ¶¶ 27-28; Smith Decl. ¶¶ 16-17. The recommendation and advice of DOD's Office of General Counsel ("OGC") contained in the DA action memorandum, and the Deputy Secretary of Defense's handwritten response, concerning certain detainees' potential involvement in the military commission proceedings of other detainees, were also withheld under the attorney-client and work-product privileges. See Stimson Decl. ¶¶ 8a, 8c, 10b, 11b.

Finally, certain detainee identifying information was withheld pursuant to Exemption 6, 5 U.S.C. § 552(b)(6). See Second Supp. Hecker Decl. ¶¶ 10-12.[5]

## ARGUMENT

### THE COURT SHOULD GRANT SUMMARY JUDGMENT TO DOD WITH RESPECT TO THE WITHHOLDINGS IN THE SAMPLE TRANSFER/RELEASE DOCUMENTS BECAUSE DOD HAS DEMONSTRATED THAT THE INFORMATION WITHHELD IS EXEMPT FROM DISCLOSURE

FOIA was enacted to "ensure an informed citizenry, . . . needed to check against corruption and hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). The statute requires each federal agency to make available to the public an array of information, and sets forth procedures by which requesters may obtain such information. See 5 U.S.C. § 552(a). At the same time, FOIA exempts nine categories of information from disclosure. See 5 U.S.C. § 552(b). FOIA thus "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." Center for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104 (2004).

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[5] Names of U.S. military personnel were also withheld from the sample documents pursuant to Exemption 6 and, with respect to JTF-GTMO personnel, Exemption 3. See Stimson Decl. ¶ 8b; Harris Decl. ¶ 5 n.1; Smith Decl. ¶ 6 n.2. AP has advised that it does not intend to challenge these withholdings. In addition, DOD has withheld information from the sample documents consistent with the withholdings that are the subject of motions pending before the Court. See infra notes 9, 13-14. The justifications for these withholdings have already been provided in the context of the pending motions, and are not repeated here.

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is the procedural vehicle by which most FOIA actions are resolved. See, e.g., Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."). "In order to prevail on a motion for summary judgment in a FOIA case, the defendant agency has the burden of showing that . . . any withheld documents fall within an exemption to FOIA." Carney v. Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994). Affidavits or declarations "giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." Id.; see also Halpern v. FBI, 181 F.3d 279, 291 (2d Cir. 1999) (same). Although this Court reviews de novo the agency's determination that requested information falls within a FOIA exemption, see 5 U.S.C. § 552(a)(4)(B); Halpern, 181 F.3d at 287, the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," Carney, 19 F.3d at 812 (citation and internal quotation marks omitted).

### A. DOD Properly Withheld Information from the Sample Documents Pursuant to FOIA Exemption 1

Exemption 1 protects records that are: (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (B) in fact properly classified pursuant to an Executive Order. 5 U.S.C. § 552(b)(1). Executive Order 12958 governs the classification of national security information. See Executive Order ("E.O.")

12958, 60 Fed. Reg. 19825 (Apr. 17, 1995), as amended.[6] Section 1.1 of the Order lists four requirements for the classification of national security information: (1) an "original classification authority" must classify the information; (2) the information must be "owned by, produced by or for, or [be] under the control of the United States Government"; (3) the information must fall within one of eight protected categories of information listed in Section 1.4 of the Order; and (4) the original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be "able to identify or describe the damage." E.O. 12958, § 1.1.

An agency can demonstrate that it has properly withheld information under Exemption 1 of FOIA if it establishes that it has met the substantive and procedural requirements of the Executive Order. Substantively, the agency must show that the records at issue logically fall within the exemption, i.e., that Executive Order 12958 authorizes the classification of the information at issue. Procedurally, the agency must demonstrate that it followed the proper procedures in classifying the information. See Salisbury v. United States, 690 F.2d 966, 972 (D.C. Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724, 737-38 (D.C. Cir. 1981).

Because the agencies responsible for national security have "unique insights" into the adverse effects that might result from public disclosure of classified information, courts accord "substantial weight" to agency affidavits justifying classification. Military Audit Project, 656 F.2d at 738 & nn.47-48 (citing legislative history); accord Doherty v. Dep't of Justice, 775 F.2d 49, 52 (2d Cir. 1985); Miller v. Casey, 730 F.2d 773, 777 (D.C. Cir. 1984); Halperin v. CIA, 629 F.2d 144,

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[6] Executive Order 12958 was amended by Executive Order 13292. See E.O. 13292, 68 Fed. Reg. 15315 (Mar. 25, 2003). All citations in this brief to Executive Order 12958 are to the Order as amended.

148 (D.C. Cir. 1980); Earth Pledge Found. v. CIA, 988 F. Supp. 623, 626 (S.D.N.Y. 1996), aff'd, 128 F.3d 788 (2d Cir. 1997). "Courts must be especially deferential to agency judgment when . . . the Government is concerned with protecting intelligence sources and intelligence gathering methods." Earth Pledge Found, 988 F. Supp. at 626; see also Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (disapproving of district court's performance of "its own calculus as to whether or not harm to the national security or to intelligence sources and methods would result from disclosure").

All of the information withheld from the sample transfer/release documents pursuant to Exemption 1 was classified by an original classification authority at the time of AP's FOIA request. See Harris Decl. ¶¶ 14, 24; Stimson Decl. ¶ 11a; Smith Decl. ¶ 15. The information therefore meets the procedural requirements for classification. The information also meets the substantive requirements for classification under the Executive Order. As set forth below, the declarations submitted by DOD, which are entitled to substantial deference from the Court, amply support classification of the information that has been withheld under Exemption 1.

**1. Much of the Withheld Information Concerns Intelligence Sources and Methods, the Disclosure of Which Could Reasonably Be Expected to Cause Serious Damage to National Security**

The majority of the information withheld under Exemption 1 "concern[s] . . . intelligence sources or methods" within the meaning of Section 1.4(c) of Executive Order 12958. This includes background information regarding the detainees, such as (1) biographical information, (2) information regarding how the detainees became affiliated with the Taliban, al Qaeda, or associated forces that are engaged in hostilities against the United States or its coalition partners, their training, and actions taken in support of those organizations, and (3) specific conclusions drawn by analysts about their activities, why they were transferred to Guantanamo, and the circumstances of their capture. Harris Decl. ¶ 14.[7] This background information, provided through the detainees' own reporting or the reporting of other sources, including other detainees, reveals critical details about the intelligence that the U.S. government has gleaned about organizations hostile to the United States and its coalition partners, and about the sources of that intelligence. Id. ¶ 16.

Withheld information regarding the conclusions reached by analysts with respect to the intelligence and law enforcement value and threat level of individual detainees also concerns intelligence sources and methods under Section 1.4(c) of Executive Order 12958. See Harris Decl. ¶¶ 23, 25; Smith Decl. ¶ 11. These withholdings would reveal the type of information that is of particular interest to U.S. government personnel in assessing detainees, and specific conclusions that were reached by analysts with regard to such information. Harris Decl. ¶ 25. JTF-GTMO/USSOUTHCOM intelligence and threat assessments, in conjunction with the underlying factual information, would disclose how analysts evaluate the relative value of certain intelligence and threat information. Id. Similarly, the results of CITF's intelligence community database searches would reveal information about the procedures used in the investigation, the names and sources of the classified databases, and the results of the investigatory searches. Smith Decl. ¶ 15.

Disclosure of this information could reasonably be expected to cause serious damage to national security because it would reveal information concerning an intelligence source, the specific information obtained from such a source, or both. Id. ¶ 16. The potential harm is two-fold. First, as Admiral Harris explains, release of the withheld information would educate terrorist organizations about the quality and quantity of the intelligence that the U.S. government has gathered about their activities:

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[7] For example, in the case of the detainee described in the sample assessment memoranda, the withheld information describes the organization that recruited him to leave his home country in order to travel to Afghanistan and fight against the United States. Harris Decl. ¶ 14. It also describes the training he received in Afghanistan and the specific hostile actions he took while in Afghanistan, as well as how he was captured. Id.

> If the United States government publicly released information about our knowledge of the specific recruitment mechanisms of certain organizations and the actions taken by its recruits[,] or if we revealed the specific activities or associations of the detainees, even if no longer in DoD control, this would reveal the extent of the United States' intelligence activities, especially when released information can be assembled together with other released information and reveal a considerable amount of detail about the level of our intelligence about certain individuals and/or organizations. Revealing the extent of information gathered concerning a particular detainee would show what the United States government knows concerning aspects of terrorism and those associated with extremist causes, the nature of the information intelligence organizations have yet to develop, and ongoing leads and efforts of intelligence organizations as they gather intelligence. Ultimately, release of this information would aid those persons hostile to the United States in hiding their activities and finding other means to thwart intelligence-gathering efforts.

Id. ¶ 17; see also id. ¶¶ 25, 30.

Second, if the background information in the sample transfer/release documents was released publicly, "it would reveal the source of the intelligence at issue in the document." Id. ¶ 18; see also id. ¶ 30.[8]

> The public release of such information, even for individuals who are no longer held at Guantanamo Bay, will have a chilling effect on human intelligence collection and substantially impede the DoD's ability to gather actionable intelligence from detainees held at Guantanamo Bay. Releasing this information would reveal to the world cooperation that detainees have provided to interrogators at Guantanamo Bay. In some cases, it would also reveal that other sources, including other detainees, had provided intelligence information about the detainee, ultimately placing the source, or perceived source, at risk of harm.

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[8] In the case of the detainee discussed in the sample assessment memoranda, for example, release of the background information would reveal that he served as the source of certain intelligence information about a specific organization that recruited him into fighting jihad against the United States and its coalition partners, as well as the fact that he provided certain specific information about his involvement with the Taliban. Harris Decl. ¶ 18.

Id.; see also id. ¶¶ 19-20 (human intelligence, the "most effective source of actionable information for the anticipation and interdiction of terrorist activity," dependent upon "cooperation of human intelligence sources"); id. ¶¶ 20-22 (process of gaining actionable information from human intelligence sources built upon trust, confidentiality, and sense of anonymity; cooperating detainees at JTF-GTMO have specifically voiced concerns about reprisals as a result of cooperation or perceived cooperation with U.S. government; alleviating cooperating individuals' perceived or genuine concerns about reprisals "an essential part of developing human intelligence sources and gathering usable information"). Thus, releasing information provided by intelligence sources "would dissuade them, and future sources, from cooperating in the future." Id. ¶ 22.[9]

### 2. Certain of the Withheld Information Concerns Interactions With a Foreign Government Regarding Specific Detainees, Disclosure of Which Could Reasonably Be Expected to Cause Serious Damage to National Security and Foreign Relations

With respect to the sample DA action memorandum, DOD has also withheld a handwritten notation by the Deputy Secretary of Defense regarding discussions with the country of origin of the detainees at issue. See Stimson Decl. ¶¶ 9c, 11. This notation logically falls within Executive Order 12958 because it "concerns . . . foreign relations or foreign activities of the United States," E.O. 12958 § 1.4(d), the release of which could reasonably be expected to cause serious damage to national security and foreign relations. Stimson Decl. ¶ 11a.

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[9] DOD is withholding a detainee photograph contained in the sample DA worksheet, for the same reasons that detainee photographs are being withheld in AP v. DOD, 06 Civ. 1939 (JSR) ("AP III"). See Stimson Decl. ¶ 9c. The propriety of DOD's withholding of detainee photographs is before the Court in the pending motion for summary judgment in AP III, and DOD adopts and incorporates herein its submissions in that case as they relate to the withholding of detainee photographs. The potential harms associated with disclosure of detainee photographs are exacerbated in this context, as the photograph in the sample worksheet is accompanied by specific intelligence information about (and potentially provided by) the detainee. See Stimson Decl. ¶¶ 7, 9; Harris Decl. ¶¶ 14, 16.

The withheld information would reveal highly sensitive information about discussions between the United States and the foreign government of the detainees. Id. It is crucial that the United States be able to treat its dealings with foreign governments with discretion, and the United States does not unilaterally publicize those dealings. Id. If the U.S. government is required unilaterally to publicly disclose its communications with a foreign government relating to the disposition of particular detainees, that government, as well as other governments, would likely be reluctant in the future to communicate frankly and fully with the United States concerning such issues. Id. This would seriously undermine and impair our ability to transfer and release detainees to their home governments and may adversely impact those nations' cooperation in this and other aspects of the Global War on Terrorism.

* * *

Additional support for DOD's withholdings pursuant to Exemption 1 is provided in the classified declaration of Dr. Stephen A. Cambone, Under Secretary of Defense for Intelligence, which is submitted for the Court's review ex parte and in camera.[10] For the reasons set forth in the classified and unclassified declarations submitted by DOD, the information withheld from the sample documents under Exemption 1 is currently and properly classified, and is therefore exempt from disclosure under FOIA.

**B. DOD Properly Withheld Information from the Sample Transfer/Release Documents Pursuant to FOIA Exemption 2**

Information that is "related solely to the internal personnel rules and practices of an agency" is exempt from disclosure under Exemption 2. 5 U.S.C. § 552(b)(2). Exemption 2 applies to

[10] Dr. Cambone's classified declaration is being stored in a proper secure location and will be made available for review at the Court's convenience.

materials "'used for predominantly internal purposes.'" Schiller v. NLRB, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (quoting Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc)). This exemption has been held to protect two types of information: (1) information the release of which may risk circumvention of agency regulation, and (2) material that relates to trivial administrative matters of no genuine public interest. Id. The former application of the exemption is known as "high 2," while the latter is known as "low 2." See id.; Wiesenfelder v. Riley, 959 F. Supp. 532, 535 (D.D.C. 1997). The information withheld from the sample transfer/release documents under Exemption 2 is exempt under high 2.

**1. The Withheld Information is Predominantly Internal**

The withheld information meets Exemption 2's threshold requirement because it is used for predominantly internal purposes. See Schiller, 964 F.2d at 1207. The information withheld from the USSOUTHCOM and CITF memoranda and the DA worksheet under Exemption 2 includes the conclusions reached by JTF-GTMO, USSOUTHCOM and CITF analysts regarding the intelligence and law enforcement value and threat assessment of the detainee at issue. Harris Decl. ¶ 23; Smith Decl. ¶ 10. Release of this information would disclose the internal guidelines followed by the respective DOD components in making such assessments. Harris Decl. ¶ 26; Smith Decl. ¶ 12.

The information withheld from the CITF memorandum also concerns the status of the law enforcement investigation of the detainee, including the details of certain investigative steps undertaken by CITF and the results of certain agency and intelligence community database checks. Smith Decl. ¶ 13. Release of this information would disclose internal general guidelines followed by CITF in conducting its law enforcement investigations. Id. ¶ 14.

In addition, full ISNs for detainees were also withheld under Exemption 2. Harris Decl. ¶ 31. The non-numeric portion of an ISN contains information specific to each detainee that is used to identify certain information pertinent to detainee and intelligence-gathering operations. Id. Further, the full ISN is often used in intelligence message traffic and reports to identify a particular detainee as a source of intelligence information. Id.

These various kinds of internal agency information relating to intelligence and law enforcement guidelines and procedures clearly qualify as "predominantly internal" information. See, e.g., Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 547 (2d Cir. 1978) ("internal law enforcement manuals" entitled to protection under Exemption 2); Delta Ltd. v. Customs & Border Protection Bureau, 384 F. Supp. 2d 138, 147-48 (D.D.C. 2005) (finding "procedures, guidelines and techniques utilized by the agency in an operational environment" were predominantly internal and exempt as "high 2" information), vacated in part on other grounds, 393 F. Supp. 2d 15 (D.D.C. 2005); Wiesenfelder, 959 F. Supp. at 535 (courts "have treated agency guidelines for conducting investigations and identifying law violators as 'predominantly internal'").

**2. Disclosure of the Withheld Information May Risk Circumvention of Counterterrorism Initiatives**

The withheld information also meets the other requirement of high 2 -- that disclosure of the information "may risk circumvention of agency regulation." Caplan, 587 F.2d at 548. As Admiral Harris explains,

> The JTF-GTMO/USSOUTHCOM assessment is the end result of a process that has involved months to years of intelligence collection on a particular individual. Intelligence sources and methods are inherently used in this process. If this information were publicly released, a skilled and knowledgeable individual could put together patterns of intelligence that are important to the United States government and glean information regarding how this intelligence is obtained, and then take steps to counter or thwart our intelligence-gathering means and methods. Ultimately, this would damage U.S. national security.

Harris Decl. ¶ 26. Similarly, if the internal CITF information were publicly released, a skilled and knowledgeable individual could discern patterns of law enforcement information that are important to the U.S. government, learn how certain kinds of information are obtained, discover information about the procedures followed during CITF's investigations, and take steps to counter or thwart CITF's ability to gather information in the future, ultimately damaging national security and the government's ability to bring terrorists to justice. Smith Decl. ¶¶ 12, 14.

Public disclosure of the full ISNs of detainees, furthermore, could allow persons to potentially access information concerning detainees from DOD databases and other sources and then cross-reference the detainee numbers with other information in the public domain to identify specific detainees, DOD personnel associated with detainee operations and intelligence-gathering activities, and other individuals mentioned in DOD documents. Access to this information, much of it classified, would have the effect of impeding JTF-GTMO detention and intelligence-gathering operations. Harris Decl. ¶ 31.

For all of these reasons, DOD has shown that release of the information withheld under Exemption 2 would risk circumvention of agency counterterrorism initiatives. See Caplan, 587 F.2d at 547 (information "may risk circumvention of agency regulation" where disclosure would "significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in their detection"); Wiesenfelder, 959 F. Supp. at 537 ("Release of documents that reveal the nature and extent of specific agency investigations has consistently been held protected on this circumvention basis."); see also, e.g., Massey v. FBI, 3 F.3d 620, 622 (2d Cir. 1993) (FBI properly withheld informant symbol numbers and other identifying source information under Exemption 2)[11]; Gordon v. FBI, 388 F. Supp. 2d 1028, 1035-37 (N.D. Cal. 2005) (Exemptions 2 and 7(E) properly invoked to protect materials created in course of maintenance of terrorist watch lists because terrorists could educate themselves about watch list procedures and devise ways to circumvent watch lists); Blanton v. U.S. Dep't of Justice, 63 F. Supp. 2d 35, 43 (D.D.C. 1999) (Exemption 2 properly invoked to withhold FBI source symbol numbers and other identifiers and information about administrative practices and procedures "the release of which might provide the public with insight into the internal handling of investigations involving race crimes" (internal quotation marks omitted)); cf. also Center for Nat'l Sec. Studies, 331 F.3d at 928-29 (finding that even information that may appear innocuous or trivial in isolation "could be of great use to al Qaeda in plotting future terrorist attacks or intimidating witnesses" because it would allow knowledgeable persons to piece together a "composite picture" of September 11 investigation and enable terrorists to evade investigation and devise countermeasures).

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[11] Because there is "no legitimate public interest in [DOD's] practice of labeling or identifying its sources," Massey, 3 F.3d at 623, the full ISNs are also exempt under low 2.

The D.C. Circuit recently re-emphasized the need for judicial deference to agency assessments of potential harm in a case involving counterterrorism law enforcement efforts:

> The need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore. Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information . . . . It is abundantly clear that the government's top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security.

Center for Nat'l Sec. Studies, 331 F.3d at 928. Just as heightened deference is warranted in the Exemption 1 and Exemption 7(A) contexts, DOD's assessment of the potential risks of disclosure of its counterterrorism initiatives is similarly entitled to deference under Exemption 2. See id. ("Judicial deference depends on the substance of the danger posed by disclosure -- that is, harm to national security -- not the FOIA exemption invoked."). Considering the deference owed to DOD's predictive judgments in this area, its withholdings under Exemption 2 were clearly proper.

### C. DOD Properly Withheld Information from the Sample Transfer/Release Documents Pursuant to FOIA Exemption 5

Exemption 5 of FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." Hopkins v. U.S. Dep't of Housing and Urban Dev., 929 F.2d 81, 84 (2d Cir. 1991). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (e.g., attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5 . . . ." Tigue v. U.S. Dep't of Justice, 312 F.3d 70, 76 (2d Cir. 2002) (quoting Grand Central P'ship, Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999)); accord Wood v. FBI, 432 F.3d 78, 83 (2d Cir. 2005).

The exemption protects both "intra-" and "inter-agency" records. 5 U.S.C. § 552(b)(5). "Exemption 5 does not distinguish between inter-agency and intra-agency memoranda" because Congress "plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency." Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); accord Tigue, 312 F.3d at 77.

#### 1. The Withheld Information Is Protected By the Deliberative Process Privilege

In enacting Exemption 5, "[o]ne privilege that Congress specifically had in mind was the 'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." Hopkins, 929 F.2d at 84.

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (citations and internal quotation marks omitted).

The deliberative process privilege serves this purpose in three important ways: first, by assuring that "subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations"; second, by protecting "against premature disclosure of proposed policies before they have been finally formulated or adopted"; and finally, by protecting "against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action." Grand Central P'ship, 166 F.3d at 481 (citations and internal quotation marks omitted).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" Id. at 482 (citations omitted). The information withheld from the sample transfer/release documents pursuant to Exemption 5 -- intra- and inter-agency recommendations and advice to the Deputy Secretary of Defense concerning whether particular detainees should be released, transferred, or continued in detention, see Stimson Decl. ¶¶ 8a, 9a, 10a; Harris Decl. ¶¶ 27-28; Smith Decl. ¶¶ 16-17 -- easily satisfies these criteria.

**a. The Recommendations Are Predecisional**

A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." Renegotiation Bd., 421 U.S. at 184, quoted in Hopkins, 929 F.2d at 84, and Grand Central P'ship, 166 F.3d at 482. This category of material includes "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Grand Central P'ship, 166 F.3d at 482 (citation and internal quotation marks omitted). A document will be considered predecisional if the agency can "pinpoint the specific agency decision to which the document correlates," and "verify that the document precedes, in temporal sequence, the decision to which it relates." Id. at 482 (citation and internal quotation marks omitted). Documents prepared by agency officials who "themselves lack any authority to take final agency action . . . are necessarily predecisional." Hopkins, 929 F.2d at 85.

The recommendations withheld here are clearly predecisional because they were prepared by various DOD components and agencies, all of which lacked decision-making authority, and provided to the Deputy Secretary of Defense prior to his decision regarding whether to transfer, release, or continue to detain particular detainees. See Stimson Decl. ¶¶ 5-7, 10a; Harris Decl. ¶ 28; Smith Decl. ¶ 17.

**b. The Recommendations Are Deliberative**

"A document is 'deliberative' when it is actually . . . related to the process by which policies are formulated." Grand Central P'ship, 166 F.3d at 482 (citation and internal quotation marks omitted; alteration in original). In determining whether a document is deliberative, courts inquire as to whether it "formed an important, if not essential, link in [the agency's] consultative process," id. at 483, whether it reflects the opinions of the author rather than the policy of the agency, id.; Hopkins, 929 F.2d at 84, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]," Grand Central P'ship, 166 F.3d at 483.

The recommendations withheld from the sample documents are deliberative because they were provided to the Deputy Secretary of Defense for his consideration in deciding whether to release, transfer, or continue to detain particular detainees. See Stimson Decl. ¶¶ 5-7, 8a, 9a, 10a; Harris Decl. ¶ 28; Smith Decl. ¶ 17. As such, the recommendations were "actually related to the process" by which the transfer/release decision was made by the Deputy Secretary of Defense, formed an "important, if not essential, link" in that decisionmaking process, and reflected the opinions of the respective authors rather than the policy or decision of DOD. See Grand Central P'ship, 166 F.3d 482-83. In addition, because the intra- and inter-agency recommendations did not always agree, and it is impossible to discern the actual reasons or rationales for the Deputy Secretary of Defense's ultimate determination regarding transfer or release of a particular detainee, see Stimson Decl. ¶¶ 6, 10a; Harris Decl. ¶ 28; Smith Decl. ¶ 17, release of the recommendations could reflect inaccurately or prematurely upon the views of the agency. See Grand Central P'ship, 166 F.3d at 482.[12]

**c. Disclosure of the Recommendations Would Harm the Decisionmaking Process**

Release of the withheld recommendations, moreover, would cause the very harms that the deliberative process privilege is intended to prevent. As explained in DOD's declarations, public release of this information would discourage open and frank discussions between the various DOD

[12] In addition, there is no evidence that the Deputy Secretary of Defense adopted the reasoning of any particular recommendation merely by agreeing with its conclusion. See Wood, 432 F.3d at 84 (Second Circuit has "cautioned that an agency does not adopt or incorporate by reference a pre-decisional memorandum where it only adopts the memorandum's conclusions"); Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 359 (2d Cir. 2005) ("[W]here an agency, having reviewed a subordinate's non-binding recommendation, makes a 'yes or no' determination without providing any reasoning at all, a court may not infer that the agency is relying on the reasoning contained in the subordinate's report.").

components and agencies participating in the detainee review process and the Deputy Secretary of Defense. See Stimson Decl. ¶ 10a; Harris Decl. ¶ 28; Smith Decl. ¶ 17. Public disclosure would limit candid discussions and recommendations concerning, among other things, DA's efforts to transfer and repatriate detainees, would have a chilling effect on the organizations that are part of the detainee review process, and would seriously erode the free exchange of information within and between DA, the Office of Secretary of Defense Policy, and other U.S. government agencies that are working closely in detention operations. Stimson Decl. ¶ 10a; see also Harris Decl. ¶ 28 (if JTF-GTMO/USSOUTHCOM recommendations were publicly disclosed under FOIA, "those involved in formulating such recommendations in the future would be dissuaded from providing complete, candid opinions and recommendations"); Smith Decl. ¶ 17 (same for CITF recommendations). Thus, protection of the recommendations here would foster Exemption 5's key purposes. As "documents reflecting advisory opinions [and] recommendations . . . comprising part of a process by which governmental decisions are made," Wood, 432 F.3d at 83, the intra-and inter-agency recommendations contained within the sample documents are quintessentially deliberative documents that are exempt from disclosure under Exemption 5.

### 2. Certain of the Withheld Information Is Also Protected By the Attorney-Client and Work Product Privileges

Certain of the information withheld pursuant to Exemption 5 consists of OGC's recommendation to the Deputy Secretary of Defense regarding the disposition of detainees, and the Deputy Secretary of Defense's handwritten notation responding to the points raised by OGC. See Stimson Decl. ¶¶ 8a, 8c, 10b, 11b. This information is protected by both the attorney-client and work product privileges.

First, because the information reveals confidential communications between the Deputy

Secretary of Defense and his attorneys in DOD's Office of General Counsel, it is protected by the attorney-client privilege. See id. ¶¶ 10b, 11b; United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997) (privilege applies to "legal advice of any kind" "from a professional legal advisor in his capacity as such" if "communications relating to that purpose" are "made in confidence" (citation and internal quotation marks omitted)).

Second, the OGC's recommendation and the Deputy Secretary of Defense's response concern legal strategy regarding the potential use of certain detainees' testimony or statements at the anticipated military commission proceedings of other detainees. See Stimson Decl. ¶¶ 10b, 11b. Such information is protected by the work product doctrine. See Fed. R. Civ. P. 26(b)(3) (generally protecting documents "prepared in anticipation of litigation or for trial" and directing that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation").[13]

For all of these reasons, the information withheld from the sample documents pursuant to Exemption 5 is protected from disclosure under FOIA.

### D. DOD Properly Withheld Information from the Sample Transfer/Release Documents Pursuant to FOIA Exemption 6

Exemption 6 protects information contained in "personnel and medical files and similar files" where disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 6 requires the Court to balance the privacy interests at stake against the public's interest in disclosure. See U.S. Dep't of State v. Ray, 502 U.S. 164, 175-76 (1991); Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976).

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[13] DOD is also withholding under Exemption 5 the identifying information of approximately 12 detainees whom the Deputy Secretary of Defense determined through the pre-ARB process can be transferred or released, but who have not yet departed Guantanamo because appropriate transfer assurances have not been obtained from the receiving governments. Second Supp. Hecker Decl. ¶ 13; see also Declaration of Karen L. Hecker dated February 22, 2006 ("First Hecker Decl.") ¶¶ 3, 16a-c. The propriety of this withholding is before the Court in the pending motion for summary judgment in AP II.

Establishing that disclosure of personal information would serve a public interest cognizable under FOIA is the plaintiff's burden. See National Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004). The "only relevant public interest to be weighed in this balance is the extent to which disclosure would serve the core purpose of FOIA, which is contribut[ing] significantly to public understanding of the operations or activities of the government." Dep't of Defense v. FLRA, 510 U.S. 487, 495 (1994) (citation and internal quotation marks omitted). Thus, the statutory purpose is not "fostered by disclosure of information about private citizens that is accumulated in various government files but reveals little or nothing about an agency's own conduct." U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 773 (1989).

**1. The Withheld Information Constitutes Medical or Similar Files**

The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." U.S. Dep't of State v. Washington Post Co., 456 U.S. 595, 599 (1982). The Supreme Court has interpreted Exemption 6 broadly, making clear that the statutory language files "similar" to personnel or medical files encompasses any "information which applies to a particular individual." Id. at 602, quoted in Wood, 432 F.3d at 87 n.6. Because the information withheld from the sample documents pursuant to Exemption 6 "can be identified as applying to" the detainees in question, Washington Post, 456 U.S. at 602; Second Supp. Hecker Decl. ¶ 10, the information satisfies the "similar files" requirement of Exemption 6. In this case, moreover, some of the information withheld constitutes medical information, Second Supp. Hecker Decl. ¶ 10, which is clearly covered by Exemption 6, see 5 U.S.C. § 552(b)(6) (protecting "medical files").

**2. The Detainees' Privacy Interests Outweigh Any Public Interest in Disclosure**

Once it has been established that the information at issue consists of "medical" or "similar files," 5 U.S.C. § 552(b)(6), the Court must balance the public's interest in disclosure against the privacy interest that would be furthered by non-disclosure. See FLRA, 510 U.S. at 495; Reporters Comm., 489 U.S. at 776; Rose, 425 U.S. at 372.

On the privacy side of the scale, disclosure of the withheld information could reasonably be expected to subject the detainees, all of whom were determined to be enemy combatants, and their family members to public scrutiny and curiosity and expose them to embarrassment and unwanted attention. Second Supp. Hecker Decl. ¶ 11; Harris Decl. ¶ 21; see also Ray, 502 U.S. at 176 (finding privacy interest where disclosure "could subject [Haitian returnees] or their families to embarrassment in their social and community relationships"); Rose, 425 U.S. at 376-77 (redactions promoted "privacy values" by protecting subjects of disciplinary hearings from "embarrassment, perhaps disgrace"); Washington Post, 456 U.S. at 599 ("Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."). The fact that AP likely intends to publish the information contained in the transfer/release documents, and contact the detainees and their family members, exacerbates the potential harm from disclosure of the detainees' personal information. See Ray, 502 U.S. at 549.

As set forth in DOD's prior submissions, moreover, DOD has serious concern that release of the detainees' identifying information, in conjunction with the details of their involvement in the Global War on Terrorism, could place the detainees and their family members at substantial risk of harassment and even physical harm, including from individuals who believe that the detainees may have cooperated with interrogators at Guantanamo. Second Supp. Hecker Decl. ¶ 11; see also

Harris Decl. ¶ 18 (release of background information in sample document would reveal source of intelligence at issue, ultimately placing the source, or perceived source, at risk of harm); id. ¶ 21 (cooperating detainees at Guantanamo have specifically voiced concerns about reprisals, and often request that they not be associated with the information they are providing or identified as sources "based on a fear of retaliation, embarrassment, and harm to themselves and members of their famil[ies]"). This concern is heightened by the release of identifying information in the context of documents contemplating the detainees' transfer or release from Guantanamo. Second Supp. Hecker Decl. ¶ 11.

This Court previously held in AP v. DOD, 05 Civ. 3941 ("AP I"), that detainees who testified at CSRT proceedings had no cognizable privacy interest in their CSRT transcripts, because the Court considered the CSRTs to be "quasi-judicial" proceedings. See AP I, 410 F. Supp. 2d 147, 156 (S.D.N.Y. 2006). However, the substantial majority of detainees who departed Guantanamo through the pre-ARB process did not participate in a CSRT. Second Supp. Hecker Decl. ¶ 12.[14] Accordingly, the factors that the Court deemed relevant to its prior determination -- the presence at the CSRTs of "the equivalent of a court reporter" and members of the press, the appointment of a personal representative to advise the detainee, or the tribunal president's explanation of the CSRT process to the detainee, see id. -- are largely inapplicable here.

On the other side of the scale, DOD has already produced voluminous information concerning the detainees, including but not limited to (1) identifying information (names, nationalities, dates and places of birth) for all persons held by DOD at Guantanamo since January 2002, (2) identifying information of all detainees who participated in a CSRT, (3) the testimony of all detainees who participated in CSRT or ARB proceedings, and (4) documents regarding alleged abuse of detainees by U.S. military personnel or other detainees. In light of the substantial information about Guantanamo detainees already made available under FOIA, the strong privacy interests of the detainees discussed in the sample transfer/release documents substantially outweigh any public interest in learning their identities. See Ray, 502 U.S. at 178.

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[14] For detainees who departed Guantanamo through the pre-ARB process and did participate in a CSRT, with the exception of persons found to no longer meet the definition of "enemy combatant," DOD is withholding identifying information for the same reasons that DOD is withholding the identities of persons who departed Guantanamo after participating in an ARB. Second Supp. Hecker Decl. ¶¶ 12, 16a; see also First Hecker Decl. ¶ 16d. The propriety of that withholding is before the Court in the pending motion for summary judgment in AP II.

## CONCLUSION

For the foregoing reasons, the Court should grant DOD's partial motion for summary judgment with respect to its withholdings in the sample pre-ARB transfer/release documents.

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August 22, 2006

Respectfully submitted,

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